Harold J. Becker Co., Inc. *and* Sheet Metal Workers' International Association Local Union No. 24, AFL–CIO, Petitioner. Case 9–RC–17814

September 29, 2004

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held July 21, 2003, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 4 against the Petitioner, with 26 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations,[2] and finds that a Certification of Representative should be issued.

The Petitioner challenged the ballots of 21 employees on the basis that they hold positions that are explicitly excluded from the parties' stipulated bargaining unit. However, the Employer contends that these employees are nonetheless eligible to vote as dual-function employees because they actually perform significant amounts of unit work.[3] The hearing officer sustained the challenges to the 21 employees' ballots on the grounds that the evidence failed to establish that these employees did sufficient unit work to warrant their inclusion. The Employer excepts to this conclusion. We find no merit in the Employer's exception and adopt the hearing officer's recommendation that the challenges to the ballots of the 21 employees be sustained.

Under well-established Board law, "[t]he test for determining whether a dual-function employee should be included in a unit is 'whether the employee [performs unit work] for sufficient periods of time to demonstrate that he . . . has a substantial interest in the unit's wages, hours, and conditions of employment.'" *Air Liquide America Corp*., 324 NLRB 661, 662 (1997) (citing *Berea Publishing Co*., 140 NLRB 516, 518–519 (1963)).[4] The Board has no bright line rule as to the amount of time required to be spent performing unit work but rather makes this determination according to the facts of each case. *Martin Enterprises*, 325 NLRB 714, 715 (1998).

In support of the Employer's contention that the 21 challenged employees performed sufficient unit work to warrant inclusion in the unit, the Employer's president, Kevin Bechtel, supplied written summaries of the percentage of sheet metal work performed by each of the 21 employees. As the hearing officer found, Bechtel conceded that he was not in a position to know the particular breakdown of each employee's work but referenced three kinds of underlying documentation in compiling the summaries: (1) daily crew logs; (2) daily work sheets required by the general contractor; and (3) the employees' individual weekly timesheets. Only the daily crew logs, which show the jobsite to which the employees were assigned on any given day, were introduced into evidence. The employees' weekly timesheets—which document the type of work actually performed by individual employees on an hourly basis and, thus, presumably would in themselves have been dispositive here—were not supplied. The Employer has not explained why it failed to provide them.

Instead, as found by the hearing officer, the Employer estimated the amount of sheet metal work performed by the disputed employees in the following manner. Using its bid sheets, which contain separate estimates of roofing hours and sheet metal hours needed to perform a given job, the Employer calculated the percentage of the

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

The Employer contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the hearing officer's report and the entire record, we are satisfied that the Employer's contentions are without merit.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the challenges to the ballots of Marvin Garrett, Matthew Kempf, Dennis Singler, Anthony Devito, and Joseph Greene.

[3] The appropriate bargaining unit set forth in the parties' Stipulated Election Agreement is: "All employees of the Employer engaged in sheet metal work, including architectural workers, but excluding all full-time estimators, truck drivers, crane operators, roofers, laborers, waterproofers and office clerical employees, and all professional employees, guards, and supervisors as defined in the Act." The employees whose voting eligibility is at issue were classified as roofers and waterproofers but also performed some amount of sheet metal work.

[4] In its exceptions, the Employer argues that the hearing officer erred in applying the standard set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002). Citing *Air Liquide*, the Employer argues that the appropriate inquiry is whether the employee performs unit work for sufficient periods of time to demonstrate that he has a substantial interest in the unit's wages, hours, and conditions of employment. We agree with the analysis as articulated in *Air Liquide*, but we do not find that it conflicts with the standard applied by the hearing officer. Thus, in *Air Liquide*, the Board considered the amount of unit work performed by the disputed employee after determining that neither the parties' Stipulated Election Agreement nor any extrinsic evidence (i.e., a *Norris Thermador* agreement) resolved the issue of whether the disputed employee should be included in the unit. That is the same analysis applied by the hearing officer in this case.

work at a given site that would be sheet metal work. Using its crew logs, the Employer then determined the jobsite to which each of the 21 disputed employees had been assigned and applied the estimated percentage of sheet metal work at that site to each disputed employee assigned there. The problem is that this calculation fails to take account of the fact that other crewmembers at a site may have been doing the sheet metal work at any given time, while the disputed employees, who also did roofing and waterproofing work, may have been performing other types of work.[5] Because the Employer's estimate of the amount of sheet metal work performed by each disputed employee was based on inconclusive, nonspecific documentation, the hearing officer found that the record fails to establish how much sheet metal work was actually done by the individual employees whose status is at issue.

We agree with the hearing officer that the site-specific rather than worker-specific evidence relied upon by the Employer cannot establish the amount of unit work actually performed by individual employees. We are, thus, unable to conclude that they "regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate that they have a substantial interest in working conditions in the unit." *Martin Enterprises*, 325 NLRB at 715.

Our dissenting colleague observes that the challenging party typically has the burden of proving that an employee is ineligible to vote and argues that here, we have erroneously placed the burden on the Employer, instead of the Petitioner. We disagree. The Petitioner has challenged the ballots of the 21 employees on the basis that they are employed in positions explicitly excluded from the parties' stipulated unit. It is undisputed, in turn, that the challenged employees do occupy these excluded positions. The Petitioner thus has substantiated the basis for its challenges.

That suffices, we believe—especially where a stipulated unit is involved—to place the burden on the Employer to establish that the challenged employees are nevertheless eligible to vote, as the Employer seeks to do here, by asserting that the employees have dual-function status. It is the Employer, of course, who is in the best position to establish that status, because it has superior access to the relevant information. And, as we have explained, the Employer has failed to produce evidence sufficient to demonstrate that, notwithstanding their explicit exclusion from the unit, the challenged employees should be permitted to vote. Given the gaps in the Employer's evidence, the Petitioner was under no obligation to rebut it. The dissent cites no cases involving asserted dual-function employees that are inconsistent with our application of evidentiary burdens here.[6]

In addition, the Board's decisions in *Air Liquide*, supra, 324 NLRB at 662 fn. 9, and *Faulks Bros. Construction Co.,* 176 NLRB 324, 331 (1969), cited by the dissent, do not require a different result here. It is true that, in those cases, the Board relied on vague and otherwise questionable testimony regarding the breakdown of an alleged dual-function employee's work. Id. But, the evidence relied on, however imprecise, went directly to the work performed by the individual employee whose status was at issue.[7] As explained above, that is not our case. By failing to introduce its contractor-required worksheets and weekly employee timecards, and instead relying only on its daily crew logs that do not address the work of individual employees, the Employer has cast doubt upon the reliability of its vague, albeit uncontradicted, estimates of the amount of time the disputed employees spent performing unit work during the relevant period. Accordingly, we are unwilling to rely on the Employer's evidence to establish the eligibility of the disputed individuals as dual-function employees.

Finally, our colleague contends that because the Employer "intended" to transition the employees to full-time sheet metal positions in the future, the challenges to their ballots should be overruled upon a showing that they spent at least 20 percent of their time performing sheet

[5] Thus, Bechtel testified that he had other roofing and waterproofing employees besides the 21 whose ballots are challenged doing smaller amounts of sheet metal work and that some full-time sheet metal workers also continued to work for the Employer. Bechtel did not offer any evidence or explanation of the amount of sheet metal work, if any, that these other workers may have been performing at sites where the 21 employees were also assigned.

[6] Our dissenting colleague errs in asserting that the Union here cannot meet its burden merely by asserting that the challenged employees occupy positions excluded from the stipulated unit, because the unit description is "ambiguous as to whether these dual-function employees are to be included in the unit." The issue here is not the correct interpretation of the unit stipulation: dual-function employees may always vote, provided they "regularly perform duties similar to those performed by unit employees for sufficient periods of time to demonstrate a substantial interest in working conditions in the bargaining unit." *Caesar's Tahoe*, 337 NLRB 1096, 1096 (2002). The question then is whether the employees at issue here meet those requirements. The Employer argues that the employees in question are, in fact, dual function employees who should be included in the unit, in spite of their undisputedly excluded job classifications. Because the Employer has created the issue by asserting "dual function," it therefore has the burden of proving that the employees should be included on that basis.

[7] In *Air Liquide*, 324 NLRB 661, the disputed employee was included in the unit as a dual function employee based on his own testimony regarding his work duties. In *Faulks Bros.,* 176 NLRB 324, the disputed employee was included in a unit of drivers as a dual-function employee based on the employer's estimate that he normally drove the truck for a particular curb and gutter crew and spent about half his time on driving responsibilities.

metal work during the relevant period. Our colleague provides no basis in law for the view that an employer's future intention with regard to work assignments bears on whether alleged dual function employees should be included in a unit. To the contrary, the Board has looked exclusively to the quantity of unit work actually performed by the employee in making that determination. See, e.g., *Martin Enterprises,* supra (rejecting as "speculative" an argument that a disputed employee is eligible to vote as a dual-function employee because his performance of unit work may increase in the future).

Because we cannot conclude based on the evidence presented in this case that the 21 disputed dual function employees did sufficient unit work to be included in the unit, we adopt the hearing officer's recommendation to sustain the Petitioner's challenges to their ballots.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Sheet Metal Workers' International Association Local Union No. 24, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the unit found appropriate:

> All employees of the Employer engaged in sheet metal work, including architectural workers, but EXCLUDING all full-time estimators, truck drivers, crane operators, roofers, laborers, waterproofers and office clerical employees, and all professional employees, guards, and supervisors as defined in the Act.

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues and the hearing officer, I find the evidence insufficient to warrant sustaining the challenges to the ballots of 18 of the 21 disputed employees. As explained below, the record fails to establish that these employees perform so little sheet metal work as to warrant their exclusion from the unit. Therefore, their ballots should be opened and counted.

At the outset, it is clear that the "party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote." *Regency Service Carts, Inc.,* 325 NLRB 616, 627 (1998) (quoting *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986)). Thus, it is not the Employer's burden to establish that these employees are eligible. Rather, as the party challenging the ballots of the disputed employees, it is the Union's burden to show that they are not eligible. That burden has not been met.

The majority ignores this fundamental principle. In so doing, the majority has incorrectly placed upon the Employer the burden of proving that the disputed employees ought to be included in the unit, even though it is the Union, not the Employer, which seeks their exclusion. Thus, the majority's premise, i.e., that the Employer has not met this burden, fails to withstand scrutiny.

Applying the appropriate standard, I conclude that the Union has not met its burden as to 18 of the 21 employees.[1] The uncontradicted testimony establishes that, prior to the expiration of the parties' 8(f) agreement on May 31, 2003, the Employer decided that it no longer wished to maintain a bargaining relationship with the Petitioner. To that end, the Employer selected approximately 21 of its extant roofers, laborers, and waterproofers to replace the Union's sheet metal workers at the end of the contract. There is no dispute that the Employer planned to transition all 21 of these employees to permanent sheet metal positions. During the waning days of the contract, these employees began their transition, but continued to perform some of their previous job responsibilities. By the end of the contract, only four union sheet metal workers remained.

The record shows that 18 of the 21 employees performed sheet metal work at least 20 percent of the time during the relevant period. The calculations are based on the Employer's written daily summaries, daily crew logs, employee timecards and the uncontradicted testimony of Kevin Bechtel, the Employer's president.

Despite this evidence, my colleagues contend that the record does not adequately establish that any of the disputed employees performed sufficient sheet metal work to warrant their inclusion in the voting unit. As noted above, my colleagues have misplaced the burden of proof. The burden is on the party seeing *exclusion*.

While the Union does not dispute that these employees perform some sheet metal work, it has offered no evidence as to the actual performance of this work. In fact, all of the relevant evidence was offered by the Employer. The Employer has shown that these employees perform a significant amount of sheet metal work and are in the process of transitioning to full-time sheet metal work. My colleagues say that the Employer's evidence was insufficient to show exclusion. However, where, as here, the burden of proof is on the party who desires exclusion (here, the Union), I do not understand how the Employer's alleged deficiency can satisfy the *Union's* burden of proof.

Contrary to the majority's contention, the Union's burden is not met merely by asserting that the challenged employees occupy excluded positions. As the hearing officer found, the election agreement is ambiguous as to whether these dual-function employees are to be included

[1] I find that the Union has shown that employees Charles Frisk, Dennis Frisk, and Richard Lyons did not perform 20 percent sheet metal work during the relevant period. Accordingly, I agree that they are ineligible.

in the unit, and the extrinsic evidence fails to clarify the ambiguity. The existence of this ambiguity necessitates an inquiry as to whether the 21 employees are eligible under a community-of-interest "dual function" analysis. However, the burden in this inquiry rests with the party seeking to exclude these individuals from voting, i.e., the Union.

My colleagues assert that the unit description is clear and unambiguous. I disagree. The unit includes "all employees . . . engaged in sheet metal work." It excludes "roofers, laborers . . . waterproofers." The employees involved herein are engaged in sheet metal work. (The unit description does not say exclusively engaged in that work.) The employees are also nominally in the excluded classifications, and perform that work as well. Thus, there is an ambiguity as to these dual-function employees. My colleagues say that, as to dual-function employees, the burden of proof is on the party who wishes to *include* the employees. The only case that they cite for this proposition is *Caesar's Tahoe.* There is nothing in that case which alters the general rule that the burden of proof is on the party who wishes to exclude a statutory employee. Indeed, the employee was included in *Caesar's Tahoe*.

Thus, the challenges to these ballots have been improperly sustained.

Moreover, even assuming the Employer actually had the burden of proof in this case, I find that the record evidence affirmatively establishes that the 18 disputed employees perform sufficient sheet metal work to warrant their inclusion in the unit.

The written daily summaries and Bechtel's undisputed testimony document the percentage of time each employee spent performing unit work. The summaries themselves were based on daily crew logs, daily work sheets, and individual weekly timesheets. Concededly, only the first of these was admitted into evidence. However, those crew logs were corroborated by the Employer's uncontradicted testimony. The percentage of sheet metal work performed has been ascertained by considering the site to which an employee was assigned on a daily basis, the percentage of sheet metal work that was performed at that site, and the calculation of a daily average based on these figures. The Employer's daily crew logs document the site to which each employee was assigned on a daily basis. Bechtel, in his uncontradicted testimony, provided the percentage of unit work performed at each of the Employer's jobsites. Clearly, this evidence is sufficient to develop at least a reasonable estimate of the amount of unit work performed by each of the disputed employees.

My colleagues nonetheless contend that the Employer's evidence lacks sufficient specificity. In so doing, my colleagues not only ignore the burden of proof but also hold the Employer to a higher standard than is typically required to establish the eligibility of dual-function employees. For example, in *Air Liquide America Corp.*, 324 NLRB 661 (1997), the Board found a disputed employee eligible to vote as a dual-function employee based on that employee's testimony, even though that testimony was dubious. The Board found the employee's testimony adequate to establish dual-function status despite the hearing officer's finding that the employee was "purposefully attempting to downplay" the percentage of nonunit work he performed. *Air Liquide*, above at 664 fn. 9. See also *Faulks Bros. Construction Co.*, 176 NLRB 324, 331 (1969) (finding a disputed employee eligible to vote as a dual-function employee based, in part, on "not precise" estimates of the allocation of the employee's worktime).

The majority erroneously contends that *Air Liquide* and *Faulks Brothers* are distinguishable from the instant case because the evidence was employee-specific. The cases themselves mention no such distinction. Both cases raise questions regarding the sufficiency of evidence submitted to establish a disputed employee's dual-function status. These cases do not require, as the majority contends, that the evidence *must* be employee-specific. Rather, they hold that if there is *some* uncontradicted evidence, as here, then there is an adequate basis upon which to determine dual-function status. Neither *Air Liquide* nor *Faulks Bros.* go so far as to hold that if the evidence submitted is not employee-specific, it must necessarily fail.

My colleagues further take issue with the fact that the Employer has failed to account for the possibility that others (beyond the 21) may have performed sheet metal work. However, all that my colleagues can say is that these other employees "may have been doing sheet metal work." That assertion falls woefully short of meeting the burden of proof.

I recognize that the Board has generally found employees to be eligible as dual-function employees when they have performed unit work 25 percent of the time. However, this is not to say that a figure under 25 percent will necessarily exclude employees. The rule is not a hard and fast one. See *Wayside Press*, 104 NLRB 1028, 1029–1030 (1953). In the instant case, the 20-percent figure is supplemented by the undisputed fact that the Employer intended to transition these employees into full-time sheet metal positions. These are the employees who will in fact be represented if the Union is chosen, and thus these are the employees who should have a voice in deciding whether to choose representation.[2]

[2] This case does *not* turn on the Employer's intentions. The evidence of intention simply provides additional support for the figures on which I do rely.

In addition, I note that *Martin Enterprise*, 325 NLRB 714 (1998), is distinguishable. There, the Employer's intentions were speculative.